

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 August 2003

CASE NO.: 2002-LHC-2954

OWCP NO.: 1-145571

In the Matter Of:

JERRY E. GORMAN
Claimant

v.

BATH IRON WORKS CORPORATION
Employer/Self-Insured

APPEARANCES:

Janmarie Toker, Esquire
For the Claimant

John H. King, Esquire
For the Employer/Self-Insured

BEFORE: WILLIAM J. COWAN
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for worker's compensation benefits filed by Jerry E. Gorman ("the Claimant") against his employer, Bath Iron Works Corporation ("Employer" or "BIW"), under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.* ("the Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. That hearing was conducted before me in Portland, Maine on April 16, 2003, at which time all parties were given the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer. The Claimant testified at the hearing, and testimony was elicited from John B. Ruffing, a rehabilitation specialist, on behalf of the Claimant. Documentary evidence was admitted without objection as: Claimant's Exhibits CX 1-28; Employer's Exhibits EX 1-47; and a Stipulation signed by both counsel designated as Joint Exhibit JX-1. The official documents in the file were received into evidence as Administrative Law Judge Exhibits ALJX 1-13. After the hearing, Claimant offered a vocational rehabilitation report from John B. Ruffing, dated June 20, 2003, as Exhibit CX 29. No objection having been taken, it will be received into evidence. Post-hearing briefs were authorized and filed on June 30, 2003.

I. Stipulations and Issues Presented

The parties offered the following stipulations which I now adopt as my findings:

- (1) the Act applies to this claim;
- (2) the injury occurred on January 8, 1996;
- (3) the injury occurred at BIW, Bath, Maine;
- (4) the injury arose out of and in the course of the worker's employment with the Employer;
- (5) there was an Employer/Employee relationship at the time of the injury;
- (6) the Employer was timely notified of the injury;
- (7) the claim for benefits was timely filed;
- (8) the Notice of Controversion was timely filed;
- (9) the informal conference was conducted on June 6, 2002;
- (10) the worker's average weekly wage at the time of injuries was \$546.18;
- (11) the Employer has paid various periods of disability compensation from the date of injury to April 14, 2002 at a weekly compensation rate of \$386.67 and has been paying temporary partial disability compensation from April 15, 2002 to the present and continuing at a weekly compensation rate of \$200.00;
- (12) the worker has not returned to his usual job; and,
- (13) the worker has engaged in various self-employment activities.

JX 1; Cl. Br. at p. 2; Emp. Br. at p. 2. The parties further agreed that the unresolved issues for resolution are: (1) causation; (2) nature and extent of incapacity; and (c) permanency. JX 1.

II. SUMMARY OF THE EVIDENCE

The Claimant's Testimony

The Claimant, Jerry Gorman, testified at the hearing that he was born on July 30, 1964, is 37 years old, and went through the ninth grade in school, leaving to pursue a trade in carpentry and then working as a professional iron worker for about four years. TR at p. 12-14. He began working at the BIW Yard on August 8, 1988 as a welder and a fitter and worked there for about 14 years. *Id.* at p. 14-15. During that time, he sustained injuries to his knees, neck, back, shoulders, and forearm. *Id.* at p. 15. On January 8, 1996, he picked up a wire feeder, which weighs between 35 to 50 pounds, in an awkward position and heard a pop in his back and also felt pain in his shoulder blades and neck, which he described as "icing on the cake" for a number of problems leading up to this injury. *Id.* at p. 15-17. He further disclosed a neck injury which occurred two years before this one and problems with his right shoulder from overuse. *Id.* at p. 18. He believed that he continued to work on that day,

but performed lighter duties. *Id.* at p. 18. He also testified that the date of injury was determined by Ross Meadow, a BIW adjuster. *Id.* at p. 18-20. He had undergone bilateral shoulder surgery and received compensation while he was out of work for the surgery on account of the January 8, 1996 injury date. *Id.* at p. 18-19. He returned to light duty bench work, but it caused too much shoulder pain to continue welding at all, and he last worked for BIW in January of 2002. *Id.* at p. 19-21. Regarding any future job prospects at BIW, he testified that he would have to receive training to perform office work. *Id.* at p. 21.

Mr. Gorman testified that after leaving work, he returned to school, received his GED in June of 2002, and enrolled in an associate's degree program in electrical and mechanical technology and applied science at Central Maine Technical College in September, 2002. *Id.* at p. 21-22. He has been seeing a vocational rehabilitation counselor, John Ruffing, who recommended pursuing the GED and college courses. *Id.* at p. 22-23. To obtain his GED, Mr. Gorman testified that he took classes in math and writing, four days a week, and in conjunction with homework, he was studying 40 hours per week. *Id.* at p. 23. He took preliminary testing at Central Maine Technical College and was told he needed work on his writing and math and enrolled in courses in Algebra, Basic Writing, Speech, and Theology in the fall, and continued to study math and writing until those courses began. *Id.* at p. 23-24. He testified that he successfully completed all but the Theology course, which he had to put aside to concentrate more time on the necessary writing and math courses. *Id.* at p. 24-25. Studying for his courses during the fall took over 40 hours per week. He received a C+ in Algebra and passing grades in Basic Writing and Speech. *Id.* at p. 25. He is currently taking courses in Computer Applications and College Writing 101 and had originally signed up for a math course, but had to leave the course because he had a 65 average and would have to re-enroll in the summer, but he continued math tutoring. He attends classes Mondays and Wednesdays from 8:00 A.M. to 2:00 P.M. and tutoring for computers and math on Tuesdays and Thursdays from 11:00 A.M. to 1:00 P.M. and estimates his study time at 20 to 30 hours per week without actually keeping a log of his hours. *Id.* at p. 25-26. His goal is to receive his associate's degree to work as an assistant engineer and hopefully gain his engineering degree, which was Dr. Ruffing's recommendation. After he finishes his writing course, he will be finished with the prerequisites for the program, and Computer Applications will be credited towards the degree program. *Id.* at p. 26-28. He anticipates that it will take him three years starting from his fall to complete the two-year program, which would be good for him. *Id.* at p. 44-45. Regarding his free time, Mr. Gorman testified that he had more free time when he was working at BIW. *Id.* at p. 28.

Regarding the labor market surveys compiled by Arthur Stevens for BIW, Mr. Gorman testified that he has not pursued the jobs because that would interfere with his plans to re-educate himself and get a "real" job. *Id.* at p. 29. He further testified that working as a cashier would cause problems with his left arm and that these jobs would not stimulate him mentally and would hurt him psychologically. *Id.* at p. 29-30. He believed that after his education, he would be able to earn wages comparable to what he earned at BIW. *Id.* at p. 31. He started his own recycling business, "G&G Recycling", with a friend because he knew that things were not going well in the Yard. *Id.* at p. 33-35. The business was to bale and recycle cardboard, with his partner expected to do most of the physical work. *Id.* at p. 34-35. He first got his business numbers in about January of 2001, and shut down the business around the time of the hearing, having earned about \$955 in 2002. *Id.*

Mr. Gorman testified that he was aware of BIW's surveillance taping of his activities. *Id.* at p. 36. He purchased a home that required a good deal of work, which he had planned to do himself because of his skills, but has had difficulty with those plans because of his physical problems. *Id.* at p. 36-38. On May 6, 2002, he was doing some cedar shingling, and the film shows the side of his house with some silver materials on top, which used to be clapboards and he hired his brother-in-law to rip off the clapboards. *Id.* He stated that he put up the shingles, which weigh less than a pound, at waist level, but had his partner and family and neighbors put them up at the higher levels because

it would have caused him pain. *Id.* at p. 38-40. He stated that he was only able to put up the shingles for a short time that day because he had worked a lot on a previous day. He stated that from viewing the tape, you can see that he is not moving easily. *Id.* at p. 40. Regarding the tape from May 2nd, Mr. Gorman testified that it was filmed in the back of Rennie's business where he and his partner are receiving cardboard, but the film only shows him and a Rennie's employee, not his partner. *Id.* at p. 40-41. He stated that the film shows him throwing styrofoam, weighing less than two pounds, into a dumpster because it is non-recyclable, and cardboard in the back of a trailer. *Id.* at p. 41-42.

Regarding his current condition, Mr. Gorman testified that he is feeling a lot of pain in his left arm and shoulder from just sitting in the same position and in the usual problem spot in his neck. *Id.* at p. 42-43. He does not take medication unless he is really hurting. *Id.* at p. 43. On an average day, he spends his time learning the keyboard, but is having physical problems with it. *Id.* He is only able to use his treadmill for about 20 minutes without knee pain and has difficulty sleeping because of shoulder pain. *Id.* at p. 43-44.

On cross-examination, Mr. Gorman testified that prior to the January, 1996 injury, he had shoulder problems, dislocating his left shoulder when he was probably 16 or 18 and also having two surgical repairs on that shoulder before the age of 20. *Id.* at p. 46-49. These surgeries were performed by Dr. Anson in Portland, and afterwards, he did not have any problems with the shoulder, but acknowledged that BIW records showing that he tries to be careful with the left shoulder, particularly for overhead use, would be true. *Id.* at p. 49-50. He agreed that before the incident, he was careful working with the shoulder. *Id.* at p. 50.

Mr. Gorman testified that he treated with Dr. Ayres, a knee specialist, starting in October of 1996 for his knees and probably also discussed his shoulder problem. *Id.* at p. 51-52. He stated that he had problems with both shoulders, but primarily the left shoulder, during this time. *Id.* at p. 52. He acknowledged that he may not have seen another doctor until treating with Dr. Henry, in the same office, in October of 1998 for his left shoulder, which then lead to his third left shoulder surgery. *Id.* at p. 52-53. He further acknowledged that medical records first showing right shoulder problems would be with Dr. Katz in April of 1999, which showed he complained of right shoulder problems since October, 1998. *Id.* at p. 53. He remembered that this was precipitated by an incident in which he was taking a 70 disk off a big grinder, which caused a pop in his forearm and shoulder pain, but also remembered pain from tendinitis prior to that. *Id.* He stated that both shoulders have bothered him since then. *Id.* at p. 54-55.

Mr. Gorman testified that he currently treats with Dr. Katz, whom he last saw a couple of months ago for an elbow problem, and that he probably last saw him for shoulder problems in July of 2001. *Id.* at p. 55-56. He has not seen anyone else for his shoulder problems which, he expressed, was because there is no treatment available, except to replace the left shoulder. *Id.* at p. 56. He did not remember seeing test results for a functional capacity test showing he had a medium physical demand work capacity for eight hours per day. *Id.* at p. 57-58. Regarding his unwillingness to perform certain parts of the tests, he testified that this was true because it caused him pain. *Id.* at p. 58. Regarding his recycling business, he testified that he did not make any money the first year and there was a \$955 profit, which was split in half, in the second year. *Id.* at p. 59-60. Regarding his problem with the minimal salary of the jobs in the labor market survey, Mr. Gorman agreed that these would pay more than he earned in his business, but remarked that he had time invested in the business. *Id.* at p. 61-62. Regarding the physical demands of the recycling business, he testified that the weight of the loaded trailer would be about 1,000 pounds. He acknowledged that he operated a six-cycle motor tractor for short periods of time to pick up bails of cardboard weighing about 1,000 pounds, if his partner was unavailable to drive the tractor. *Id.* at p. 67-69. He further stated that he would participate in picking up the cardboard and placing it in the compactor depending on his pain level and course work. *Id.* at p. 65-66. He picked up cardboard weekly from Rennie's and a Transfer

Station and at small boxes he placed in the area. *Id.* at p. 72-73. He admitted that on the day he was shingling, he could have been doing the work from noon until at least 4:15 p.m. *Id.* at p. 70.

On redirect examination, Mr. Gorman testified that the attendants would load the cardboard at the Transfer Station and Rennie's and that he would also participate, but would experience pain afterwards and could not do this activity five days per week. *Id.* at p. 71-73. He testified that Ross Meadow put all of his injuries on the one date. *Id.* at p. 74. He stated that prior to the January, 1996 incident, he had shoulder problems because of doing overhead work typically after working four hours at a time for about four weeks. *Id.* at p. 75-76. He is able to raise his arm to a bit above shoulder level and has problems because he has no cartilage. *Id.* at p. 77. He explained about his unwillingness to do parts of the functional capacity tests, that he could lift 200 pounds because he is strong, but did not want to carry more than 20 pounds through the building. *Id.* at p. 78.

Testimony of John B. Ruffing

The Claimant called John B. Ruffing as a witness at the hearing. Dr. Ruffing testified that he has been a rehabilitation specialist and clinical counselor for 35 years and has worked with the Vocational Rehabilitation Program at the Department of Labor since 1982. TR at p. 81. He has a doctorate in Clinical Psychology and a post-doctorate from the School of Medicine in Buffalo in Mental Health Administration and a master's in Rehabilitation. *Id.* at p. 105. He was assigned to work with Mr. Gorman by OWCP some time last summer and meets with him every other month to assess his progress and report back. TR at p. 83-85. Regarding the handling of Mr. Gorman's case, he first asked BIW if they could re-hire him, but Ross Meadow told him that they could not accommodate Mr. Gorman. *Id.* at p. 85. Then, he moved Mr. Gorman to the career center, conducted testing, developed a resume and career development, and assessed the labor market in his area. *Id.* The labor market survey showed that there were jobs, mostly in the service area paying \$7.00 per hour, within his restrictions; however, many of these jobs required a lot of standing, reaching, and handling. *Id.* at p. 85-86. The career center team concluded that because Mr. Gorman was very bright and skilled mechanically, the best avenue for him would be to develop a career as an electrical mechanical technician paying at \$35,000 per year. *Id.* at p. 85-86, 106. Regarding his progress, he testified that,

[h]e went to the Adult Education Center in Lewiston, and within about a month he completed his GED and he completed an Algebra course and all of the pre-requirements for going into the vo-tech school and he's been doing really well there, yeah. He's a hard worker and he's been doing very, very well. Yeah, I=am really satisfied and they=re satisfied. They have B I just got yesterday, what the summer schedule and he's scheduled for B he's going to take classes this summer and I think he's doing quite well.

...

Id. at p. 86. Further, he stated that,

A My opinion is that he does B a lot of people B most people who we put in the school a lot of time leave the B when they go B finish the adult education part then they move into the school and sometimes we get them a tutor there because if they B nobody in the family has ever gone to college, they=re qualified for a tutor. He has done an extra. He's kept his attachments at the Adult Ed Center and he's going back to them with any Algebra problems, any mathematical stuff, so, I think he's working doubly hard then as a lot of people. So, he not only does work at school, he does back to the Adult Ed Center, yeah.

Q Has he cooperated with B

A As well as anybody could cooperate, he has. He doesn't live far from me, so if I call him and say, well, can I come over and see you, he's right there and he brings me papers or whatever I need. He's done very well.

Id. at p. 87-88. While he was at the career center, Dr. Ruffing met with him every other week and has met him a total of about 10 times. *Id.* at p. 86. Dr. Ruffing testified that he sent all of the information about the plan and the estimated costs for OWCP approval and it was approved around last September. *Id.* at p. 87. His courses are paid for out of the Longshore fund. *Id.* He believes that this plan is best-suited for Mr. Gorman because of his knowledge base and the potential for employment and salary to sustain his family, particularly where there is a big demand for workers with this type of education and 100 percent of the people in this program are placed. *Id.* at p. 88. He testified that under the OWCP Longshore Program, his instructions are to look at the wages in the labor market survey and if they are too far from what he was earning, then training should be considered, and with Mr. Gorman's young age, he has many years left to work. *Id.* at p. 88-89.

Regarding the March 14, 2002 labor market survey, Dr. Ruffing testified that he had a problem with surveys conducted by people who have never met the worker and have not taken individual motivation, interests, and dignity into account. *Id.* at p. 89-91. He does not conduct surveys without meeting the person. *Id.* at p. 91. Although, on cross-examination, he admitted that this survey takes education into account. *Id.* at p. 92-93. He agreed that his original labor market survey for Mr. Gorman identified many entry-level service positions and that these positions are generally available for \$6.50 to \$7.50 per hour. *Id.* at p. 93-94. He stated that not many people he works with go to school and work part-time. *Id.* at p. 94. He did not recommend working while in school for people like Mr. Gorman because they need time to receive tutoring and with 20 years away from school, it would be difficult for them to work and go to school. *Id.* at p. 107. He estimated that the plan for Mr. Gorman would be completed by June, 2005, which takes into account his difficulties and the introductory courses which are necessary for people like Mr. Gorman, who have been out of school for an extended period of time. *Id.* at p. 95. He did not know precisely how many courses Mr. Gorman had taken at any given time, but remarked that he was doing well, getting at least a C. *Id.* at p. 96-97. He was not aware that Mr. Gorman had projected that it would take him three years to complete the program, but he could look into this with him and his tutor and mentor. *Id.* at p. 97-99. He testified that the duration of the program is important to OWCP and they monitor the progress and review transcripts. *Id.* at p. 99-101. He believes Mr. Gorman would move along faster as he progresses in the program. *Id.* at p. 101. He was aware that Mr. Gorman had to step out of his current math course, and that he was thinking of taking the course in the summer. *Id.* He agreed that math was a foundation course, and Mr. Gorman may be set back if he does not complete the course by the fall, but the school offers remedial methods and tutoring. *Id.* at p. 101-102. He stated that Mr. Gorman is enrolled in the program as far as the Department of Labor is concerned. *Id.* at p. 104.

Medical Evidence

BIW Medical Records

A statement of injury form signed by the Claimant on January 11, 1996 shows that he reported an injury to his upper back and lower neck on January 8, 1996 when picking up a wire feeder. EX 29 at p. 42. BIW medical records show that he complained on January 11, 1996 of worsening pain in his upper back and left hand numbness of particular concern. *Id.* at p. 40. A medical discharge form dated April 13, 2000 showed restrictions for an incident dated January 8, 1996 of permanent

limits of no repetitive climbing stairs/ladders or kneeling as of 1996, indefinite limits of no pushing/pulling with left arm, no overhead with left arm, no lifting over 5 pounds with left arm as of January 28, 1999 and no vibratory tools from April 13 - 27, 2000 because of left shoulder pain. *Id.* at p. 30-32.

Functional Capacity Evaluation

A report generated by HealthSouth Rehabilitation Center of Granite Hill for a functional capacity evaluation shows that the Claimant can perform medium work for 8-hour shifts defined as “exerting 20 lbs. to 50 lbs. of force occasionally, and/or 10 lbs. to 25 lbs. of force frequently, and/or greater than negligible up to 10 lbs. of force constantly to move objects.” EX 30 at p. 43. However, it was also noted that his left shoulder condition prevents him from performing bilateral job tasks over shoulder height. *Id.* Comments indicate that the Claimant exhibited self-limiting behavior where he was able to pull over 200 lbs, but unwilling to lift greater than 40 lbs in a floor-to-knuckle lift test. *Id.* at p. 44.

Orthopedic Physician Treatment B Coastal Orthopedics & Sports Medicine, P.A. John B. Ayres, M.D., Mark F. Henry, M.D., Stephen D. Katz, M.D.

Medical records from Dr. Ayres, an orthopedic surgeon, reveal that he treated the Claimant for right knee pain and locking on November 23, 1994 and that he underwent arthroscopic surgery with meniscectomy in December, 1994 and after continued problems re-arthroscopic surgery in February, 1995. CX 20 at p. 129-134. In a State of Maine Workers Compensation Practitioner’s Report form (M-1 Form), dated December 21, 1994, Dr. Ayres indicated that the knee injury was work-related. *Id.* at p. 130.

Medical records from Dr. Henry, an orthopedic surgeon, show that he examined the Claimant on March 16, 1995 for a second opinion for continued right knee problems and performed reconstruction surgery in May, 1995. CX 19 at p. 117-119. Records reveal improvement with knee condition with some continued problems through 1995 and on August 19, 1996. *Id.* at p. 119-122. Similar to Dr. Ayres, Dr. Henry indicated that the injury was work-related in an M-1 Form, dated October 5, 1995. *Id.* at p. 120. Dr. Henry assigned permanent work restrictions to begin August 1, 1996 of no repetitive kneeling or climbing stairs or ladders. *Id.* at p. 124.

Dr. Henry’s records also indicate that the Claimant complained of left shoulder pain on August 19, 1996, of about four months duration. *Id.* at p. 122. On October 9, 1996, Dr. Henry recommended that the Claimant treat with Dr. Ayres regarding operative arthroscopy of the shoulder. *Id.* In an M-1 Form dated October 9, 1996, Dr. Henry indicated that the left shoulder injury was work-related. *Id.* at p. 123. On October 14, 1996, Dr. Ayres reported that the knee condition was doing well, but was being seen for increasing pain in the left shoulder with catching and snapping, trouble working above chest height, pain laying on his back or turning on his side over the last year. CX 20 at p. 134. Dr. Ayres diagnosed the Claimant with “degenerative disease of the left shoulder with periarticular humeral osteophytes and a bone block with screw that appeared to be in good position but with apparent loose bodies in the inferior portion of the capsule and possibly a tendonitis impingement and even a partial rotator cuff tear.” *Id.* In an M-1 Form, which is mostly illegible, Dr. Ayres indicated that an injury was work-related and assigned restrictions of no repetitive bending, twisting, stair/ladder climbing, limited bending/twisting, and no prolonged standing/sitting. *Id.* at p. 135. Dr. Henry performed arthroscopic surgery on the left shoulder on December 4, 1998, and prescribed physical therapy on December 14, 1998. *Id.* at p. 126-127. On March 1, 1999, the Claimant reported return to previous surgical condition for the left shoulder with continued pain with overhead activities, with still continued improvement reported on April 5, 1999. *Id.* at p. 128.

Dr. Katz, another orthopedic surgeon, examined the Claimant on June 7, 1999 for right shoulder impingement syndrome and left shoulder degenerative changes. CX 25 at p. 206. Noting that his left shoulder condition had plateaued, he assigned work restrictions of minimal overhead with the left arm, no lifting or carrying greater than 5 pounds with left arm and full day with right arm, based on Claimant's complaints because of difficulty in obtaining FCE numbers for left shoulder. *Id.* On April 24, 2000, Dr. Katz treated the Claimant for persistent left shoulder pain and right shoulder impingement syndrome with occasional pain. *Id.* at p. 208. Dr. Katz performed right shoulder arthroscopy and arthroscopic subacromial decompression in late August, 2000. *Id.* at p. 209-212. In an M-1 Form dated April 24, 2000, he indicated that the shoulder pain was work-related. *Id.* at p. 207. In an M-1 Form dated November 14, 2000, Dr. Katz indicated that the right shoulder surgery was work-related. *Id.* at p. 212. In an M-1 Form dated January 8, 2001, Dr. Katz indicated that the Claimant had a permanent left shoulder impairment and not a permanent right shoulder impairment and had not reached maximum medical improvement. *Id.* at p. 214. By letter to BIW dated December 3, 2001, Dr. Katz assigned continuing limits of occasional use of right arm, minimal overhead work right arm, minimal climbing, no lifting more than 15 pounds with right arm, no overhead lifting with right arm, with hopefully being able to work 8 hours within these limitations. *Id.* at p. 223.

Bernard P. Vigna, Jr., M.D.

At the referral of Dr. Katz, Dr. Vigna, a neurologist, examined the Claimant on or about November 10, 1998 for persistent left neck, shoulder, and left arm complaints for about a year and a half to two years reportedly due to a work incident involving a wire feeder. CX 18 at p. 112. Claimant reported no significant neck ache. *Id.* He diagnosed the Claimant with C6/C7 radiculopathy, with no profound effect on strength and reflexes, but with positive Spurling's maneuver to the left, with recommendation for possible physical therapy and no surgical intervention. *Id.* at p. 112-114. He opined that the radicular pain may influence left shoulder pain, but saw separate left shoulder dysfunction and agreed with surgery recommendation on left shoulder. *Id.* In an M-1 Form dated November 10, 1998, Dr. Vigna indicated that the left C6/C7 radiculopathy was work-related. *Id.* at p. 115.

Peter K. Esponnette, M.D.

Dr. Esponnette, a board-certified physical medicine and rehabilitation specialist, examined the Claimant at BIW's request on June 12, 2001 and conducted a medical records review. CX 21. Dr. Esponnette concluded that he had the following current problems:

1. Left shoulder pain.
 - a) Status post recurrent dislocations.
 - b) Status post Bankart procedure with later staple removal.
 - c) Status post lateral acromioplasty, good results.
 - d) Resistant glenohumeral degenerative joint disease.
 - e) Significant anterior shoulder fluid collection.
 - f) left arm weakness, disuse atrophy.
2. Right shoulder pain.
 - a) Previous impingement syndrome.
 - b) Status post lateral acromioplasty.
 - c) Persistent bicipital tendinitis.
3. Left cervical radiculopathy, C7, probably mild.
4. Unrelated medical problems.
 - a) Right knee pain.
 - b) Tobacco use.
 - c) Overweight status.

Id. at p. 142. He further wrote that, “[a]s Jerry pointed out, there is a reasonable chance that some of his left shoulder and arm problems are partly related to a pinched nerve in his neck.” *Id.* He opined that the Claimant had reached maximum medical improvement regarding both upper extremities, and assigned a four percent whole body impairment for the right shoulder problems, nine percent whole person impairment for the left shoulder problems and left cervical radiculopathy. *Id.* at p. 144. Finally, he wrote that “[i]t is my impression that the activities as a welder do lead to the risk of degenerative disc disease with the subsequent development of a left C7 radiculopathy.” *Id.* at p. 145. He provided work restrictions including limited lifting and carrying, rare lifting above shoulder, avoiding welding hood with hardhat, occasional shoulder height work, rarely above shoulder height work, and rarely ladder climbing. *Id.* at p. 143.

Robert N. Phelps, Jr., M.D.

Claimant offered an independent medical evaluation report authored by Robert N. Phelps, Jr., M.D., dated March 18, 2003, and referencing an evaluation date of March 4, 2003, diagnostic testing, and medical records review. CX 15 at 32-71. Dr. Phelps is a Fellow of the American Academy of Orthopedic Surgeons and Diplomate of the American Board of Orthopedic Surgery. *Id.* at 71. In his conclusions, Dr. Phelps wrote:

1. My diagnosis of Mr. Gorman’s present shoulder condition in his neck and shoulders is chronic rotator cuff tendonitis of the right shoulder, chronic rotator cuff tendonitis, subdeltoid bursitis, and degenerative joint disease of the left shoulder, and mild cervical spinal stenosis, C3-4 to C6-7, due to mildly reduced AP diameter of the cervical spinal canal and minor osteophytic spurring anteriorly with encroachment on the neural foramin bilaterally at C6-7 and C7-T1.
2. With the exception of the degenerative joint disease of the left shoulder, it is more probable than not that his present conditions are related to the injury of January 8, 1996 and/or the result of gradual trauma as a result of his work as a welder cumulating on January 8, 1996.
3. I do feel that his shoulder condition and neck condition have reached the point of maximum medical improvement, maximum medical improvement was reached in December of 1999 in terms of his right shoulder, September of 2001 for his left shoulder, and 1997 in terms of his neck. Using both the American Medical Association Guides to the Evaluation of Permanent Impairment, 4th edition and the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th edition, his whole body permanent impairment for his right shoulder would be .6 x 5% or 3%; his whole body permanent impairment for his left shoulder would be .6 x 9% or 5%, and his whole body permanent impairment for his c-spine would be 15% since he falls into the DRE Cervicothoracic Category III.
4. With respect to his right knee condition, I think that it is work related and that there is a 4% whole body permanent impairment due to the injury he has sustained.
5. I think that, from a medical standpoint, in view of the condition in his shoulders and neck, it is appropriate for him to be involved in vocational rehabilitation.
6. In terms of his day to day activities, with respect to his neck and shoulder conditions, he should avoid heavy lifting, overhead work, and work that involves using his arms away from the side of his body (reaching) or use of his arms in an overhead fashion.

7. I reviewed the video tape activities and private investigator materials. I note that the written materials indicate that Mr. Gorman was under surveillance for about a year. I further note that the other side provided taped surveillance from only three different dates: March 27th, 2002, May 6th, 2002 and May 23rd, 2002. I was struck by the fact that out of a years worth of surveillance, there was so little material submitted to support their case. This was particularly true after I reviewed the material, because if that was the worst that they could document in terms of Mr. Gorman's activities, it certainly was not very much.

The March 27th, 2002 segment of tape lasted less than two minutes. It showed Mr. Gorman standing, observing two others loading/unloading cardboard. There is one instance in which Mr. Gorman tosses a long, narrow cardboard box into a large waste container, using primarily his right arm. That amount of activity was so minimal as to be completely discounted in terms of any significance.

The second segment of tape was dated May 6th, 2002. This surveillance was taken in two segments, the first segment lasting less than a minute of activity around noon which showed Mr. Gorman walking, and a second, much longer segment covering a period of time from 2:24 in the afternoon to 3:06 in the afternoon, although this segment was not continuous. The tape showed Mr. Gorman cutting and applying shingles to the side of his house. In approximately 50 minutes of tape, Mr. Gorman actually applied shingles to the side of his house 15 times. He was working on the lower section of the house, so he had to get down on his knees to actually apply the shingles.

Most of the videotape showed him standing around, scratching his head, and hydrating himself. His left arm was at his side most of the time. He used primarily his right arm. He only went up a ladder once, and that was to enter his residence, and he only went up 2-3 steps. His pace of work was exceedingly slow, there is no way that anyone would hire him to work at this pace. As anyone who has picked up a cedar shingle knows, they are exceedingly light, and it requires practically no effort or strength in the arms to manipulate a cedar shake shingle.

Again, I thought to myself, if this is the best they could get out of a year of surveillance, it was pretty poor.

The last segment provided was dated May 23rd, 2002. This clip lasted less than two minutes, and showed Mr. Gorman standing, scratching his head, conversing, but mostly standing around. He took one cardboard box and broke it down and put it in a dumpster, this took him 2-3 seconds. He also carried a small bundle of light weight plastic strapping material and tossed that into the dumpster.

In my opinion, those surveillance materials do not undermine my opinions regarding causation or extent of disability in any way.

8. At this point, in terms of further treatment, I would recommend activity modification, with the limits as set forth above. From time to time, Mr. Gorman will need to have n-said medication. He will require cortico steroid injections and physical therapy from time to time. It is more likely than not that he will require further surgery on the left shoulder in the form of a total shoulder arthroplasty. At this point, surgery on his neck seems less than 50% likely, but does remain a possibility.

9. I do think that at some point in the future, he will require full shoulder replacements or other significant treatment, especially on the left.

10. I also note that there is some mention of depression in the medical records. Beneath his superficially jovial exterior, when he is pressed on issues like how he is going to make ends meet, how he is going to earn a living in the future, and what his vocational plans are for the future, it becomes immediately apparent that Mr. Gorman is very concerned about his condition, the impact his condition has on his ability to earn a living, and it is apparent that he is depressed over this. Despite his depression, vocational rehabilitation is especially appropriate, as it may give him some hope for the future.

11. I did review the private investigator materials with Jerry. I advised him that I do not feel that he showed any significant activities. Jerry explained to me that he was trying the cardboard recycling business as a way to earn a living now that his ability to earn a living at BIW was no longer an option due to his condition.

12. I think that the private investigator activities and possible interference with Mr. Gorman's privacy have contributed to his psychological/psychiatric sequelae in so far as those investigational activities have made him feel as though he has done something wrong, and that there is something wrong with the notion that he should be trying to improve his own residence at a pace and speed that are within his limited capabilities, and that the notion that he would try to figure out a way to earn a living now that BIW is no longer an option is somehow wrong.

Id. at p. 68-71.

William F. Boucher, M.D.

Employer introduced an independent medical evaluation report authored by William F. Boucher, M.D., M.P.H., C.I.M.E. EX 36. Regarding qualifications, Dr. Boucher is a founding member of and certified by the American Board of Independent Medical Examiners, board-certified in Occupational Medicine, a Fellow of the American College of Occupational and Environmental Medicine and the American College of Preventative Medicine, and past Chairman and current Secretary of ACOEM's Work Fitness and Disability Evaluation Section. He has conducted over 2000 IME's in the past 13 years, has spoken nationally on work fitness and disability issues, contributed to publications regarding these issues, and maintains a clinical practice as Medical Director of WorkWell at Southern Maine Medical Center. *Id.* at p. 119. Dr. Boucher examined Mr. Gorman on October 29, 2002 for a January 8, 1996 date of injury, reviewed medical records from January 11, 1996 to September 4, 2002, obtained an oral medical history, which was consistent with the record, and had him answer a questionnaire and pain inventories. *Id.* at p. 108.

In his conclusions, Dr. Boucher wrote the following:

Discussion

The examinee's injury of January 8, 1996 appears to have been left trapezius and rhomboid strain, which has resolved. He had previous difficulties with left shoulder dislocation and underwent successful Bankart repair. However, he has gone on to develop rather severe glenohumeral arthritis with current impingement signs.

In 1999, the examinee developed right shoulder impingement and underwent subacromial decompression and at this time, has no evidence of ongoing impingement.

In 1995, the examinee apparently developed a right medial meniscus tear and partial ACL tear. According to his report, he underwent partial meniscectomy and ACL repair. His right knee is now objectively normal.

Causation

Based upon the available information, to a reasonable degree of medical certainty, there is no causal relationship between the examinee's current complaints and the reported injury of January 8, 1996. As noted above, that injury was an upper thoracic strain, which has completely resolved. The examinee's left shoulder condition does appear to be work-related as a cumulative process over the years. However, it is not directly related to the January 8, 1996 incident. The examinee's cervical spondylosis is a condition of ordinary life and is not work-related. The cause of the examinee's right knee condition is not clear. However, it pre-existed the January 8, 1996 incident and is not related to that incident.

Id. at p. 117. He noted that Mr. Gorman had reached maximum medical improvement and gave him a 25 percent upper extremity impairment for the left shoulder converting to a 15 percent whole person impairment and 1 percent whole person impairment for the right knee condition. *Id.* at p. 118. He assigned him to a light to medium full-time work capacity with restrictions of lifting 30 pounds occasionally and 15 pounds frequently between floor and chest level, lifting 10 pounds overhead occasionally just right arm, no overhead lifting, reaching forcefully, pushing or pulling with the left arm, occasional reach, push or pull with the right arm, minimal squat, knee, crawl, and climb ladders, moderately climb stairs and no restrictions regarding sitting, standing, walking, bending or twisting. *Id.* at p. 118-119. He observed the surveillance videos for activities on March 27, May 6 and May 23, 2002 showing Mr. Gorman standing, walking and using his right arm with no difficulty, using left arm occasionally, but not above shoulder level, which correlate with his estimate of Mr. Gorman's work capacity. *Id.* at p. 119.

Investigatory Evidence

Employer introduced a videotape of 9:15 in duration, referencing surveillance activities on May 6, 2002 where Claimant applied what appeared to be shingles to the lower portion of his house and May 23, 2002 where Claimant, along with another person, carried cardboard and put material into a dumpster. EX 44. In addition, Employer offered investigative reports and photographs from investigatory activities from May 21, 2001 through October 17, 2002. EX 43. These photographs reportedly depict Claimant's residence, his operation of a riding lawn mower, operation of a Bobcat to load cardboard, standing near a cardboard compactor, driving various vehicles with loaded cardboard, breaking down a cardboard box and lifting material into a dumpster and bundles of cardboard material.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Causation

Positions of the Parties

According to Claimant, the parties agree that he sustained an injury, but dispute the nature

of the injury at issue in this case. Cl. Br. at p. 2. He represents that he has multiple work-related impairments, including both shoulders, his neck/upper back, and right knee and also suffers from work-related depression, and that BIW used a generic injury date of January 8, 1996 for administrative purposes to cover his multiple conditions/injuries. *Id.* at p. 2-3. While he did relate a specific injury on January 8, 1996 involving a wire feeder, Claimant asserts that his multiple conditions were caused not only from that injury, but also from cumulative injuries sustained over time through his work as a welder, and that those injuries are also part of this claim. *Id.* at p. 3.

Claimant argues that the causation issue is governed by the section 20(a) presumption and that his testimony at the hearing supports the application of the presumption where he testified that his welding work included crawling, working on his knees, climbing ladders, working overhead, working with his neck stretched awkwardly, and repeatedly using his upper extremities. *Id.* at p. 6-7. Further, Claimant represents that his treating physicians all opined that his conditions are work-related. *Id.*

Regarding the right knee condition, according to Claimant, Drs. Henry, Ayres, and Phelps agreed that it was work-related, and Employer's expert, Dr. Boucher, merely provided an equivocal statement that the cause of the knee condition is not clear, which is insufficient to rebut the presumption. *Id.* at p. 7. Regarding the left shoulder condition, Claimant submits that all of the examining physicians, including Dr. Boucher, opined that it was work-related. *Id.* Regarding the right shoulder condition, both Dr. Katz, who performed the right shoulder surgery, and Dr. Phelps offered opinions supporting the employment relationship, and as Dr. Boucher did not comment on the causation of the right shoulder condition, Employer has not rebutted the presumption. *Id.* Regarding the neck condition, Claimant submits that he was diagnosed with mild cervical spinal stenosis at C3-4 to C6-7, minor osteo spurring anteriorly with encroachment on the neural foramin bilaterally at C6-7 and C7-1, and left C7 radiculopathy. *Id.* He states that the examining neurologist, Dr. Vigna, and Dr. Phelps agreed that the neck condition was work-related, and while Dr. Boucher opined that it was life and not work-related, he did not comment on the cause of the left C7 radiculopathy, which is insufficient to rebut the presumption or alternatively to contradict the substantial record evidence establishing a relationship to his BIW employment. *Id.* According to Claimant, of great importance is the opinion of Dr. Esponnette, who examined him at BIW's request, and concluded that he could not return to welding work and that the neck conditions were work-related. *Id.* at 7-8.

In its brief, Employer disputes Claimant's assertion that a generic injury date of January 8, 1996 was used for multiple conditions or injuries. Emp. Br. at p. 2. Rather, Employer characterizes this case as involving only "an upper thoracic sprain" sustained on the reported injury date of January 8, 1996, which, according to Employer, Claimant is attempting to improperly enlarge to include alleged work-related injuries to his back, left arm, and bilateral shoulders. *Id.* Employer asserts that the Claimant lacked credibility because his testimony regarding his minimum work capacity was controverted by his functional capacity evaluation results and the surveillance materials, which showed him engaging in reasonably strenuous activities. *Id.* at p. 9-10, n.3. In addition, Claimant's testimony regarding the commencement of his right shoulder problems since at least 1996 is contradicted by the medical evidence showing he first complained about problems in April, 1999 and then referenced a commencement date around October, 1998. *Id.*

Employer bases its causation argument on the premise that the only injury at issue occurred on January 8, 1996, first contending that the evidence does not demonstrate that Claimant's current bilateral shoulder condition is causally related to the 1996 injury. *Id.* at p. 9. Employer posits that the only evidence of the employment connection to the shoulder condition is the Claimant's subjective testimony, which was not credible and is not corroborated by the objective medical evidence that shows that the Claimant had no right shoulder symptoms at the time of the 1996 incident and then not until 1999. *Id.* at p. 9-10. In addition, Employer submits that the objective record shows that

the left shoulder condition is a result of a natural progression of his earlier non-occupational injury, and that the neck, upper back, and knee conditions relate to earlier work incidents or non-occupational life activities. *Id.* at 10.

According to Employer, its medical expert, Dr. Boucher has opined that the January 8, 1996 upper thoracic strain has completely resolved, the left shoulder condition was cumulative, but not related to the January 8, 1996 incident, the neck condition was not work-related, and the right knee condition pre-existed the 1996 incident. *Id.* In addition, the right shoulder condition is not related to the 1996 incident because it does not appear in the medical record until almost two years later. *Id.* Employer argues that Dr. Boucher's opinion is supported by the objective medical record and is more reliable than that of Dr. Phelps, who essentially found that all of the conditions, except for the left shoulder condition as a degenerative joint problem, were related to the 1996 incident. *Id.* at p. 10-11. Employer also argues that I should reject Dr. Phelps' opinion on the basis of foundation and competence because his medical license has been placed on indefinite probation as of June 13, 2000 based on the Maine Board of Licensure in Medicine action for unprofessional conduct, incompetence, and violation of sexual misconduct rules (EX 45) and the voluntary surrender of his New York medical license in 2001 (EX 46). *Id.* at p. 11, n.4.

Discussion and Conclusion

Section 20(a) of the Act creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976) (*Swinton*), *cert. denied*, 429 U.S. 820 (1976). To invoke the presumption, there must be a *prima facie* claim for compensation, to which the statutory presumption refers; that is, a claim "must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615 (1982) (*U.S. Industries*). A claimant presents a *prima facie* case by establishing (1) that he or she sustained physical harm or pain and (2) that an accident occurred in the course of employment or conditions existed at work, which could have caused the harm or pain. *Kelaita v. Triple A. Machine Shop*, 13 BRBS 326, 331 (1981); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984).

The parties disagree about the nature of the injury at issue in this case. Claimant represents that BIW used an injury date of January 8, 1996 for administrative purposes to cover multiple conditions for both shoulders, his neck/upper back, and right knee which stem both from a specific injury involving a wire feeder on January 8, 1996 and cumulative trauma injuries sustained over time. Employer counters that the only injury before me, which it characterizes as "an upper thoracic strain," is the January 8, 1996 incident involving the wire feeder, and Claimant is seeking to improperly enlarge his claim to include conditions unrelated to that specific injury. Setting aside a determination on this dispute for the moment as the parties are in agreement that Claimant at the least sustained an injury on January 8, 1996, I will first determine whether that injury is causally related to Claimant's present dysfunctional condition.

Claimant credibly testified that on January 8, 1996, he picked up a wire feeder, weighing between 35 and 50 pounds, in an awkward position, heard a "pop" in his back, and felt pain in his shoulder blades and neck. Regarding Claimant's credibility, I am not persuaded by Employer's argument that the surveillance evidence and functional capacity evaluation results contradict Claimant's testimony about his work capacity. Instead, I agree with Dr. Phelps' assessment of the surveillance evidence that it does not show an individual with a significant work capacity, but rather is consistent with his complaints, showing Claimant working at a slow pace in the application of single shingles to his house, without working over shoulder height, a minimal amount of unloading of

cardboard and styrofoam, and the operation of a Bobcat for his recycling business (EX 43; EX 44). Similarly, I find that Claimant's testimony is not discredited by the functional capacity evaluation results, which show only that he can indeed lift a heavy object, and I note Claimant adamantly affirms that he has the capacity to do this; however, that is very different from the prolonged and repeated lifting and carrying that would demonstrate someone with a significant work capacity, as Employer asserts. Finally, I disagree with Employer that Claimant lacks credibility because he testified to right shoulder problems around the time of the 1996 incident, but did not report these problems and pursue treatment for the right shoulder until 1999. He clearly stated that his left shoulder was his primary concern and it makes sense that he simply pursued a course of treatment for that shoulder before the right one.

Returning to the nature of the 1996 injury, Claimant's expert, Dr. Phelps, opined that the Claimant's present neck and shoulder conditions, with the exception of the degenerative joint disease component of the left shoulder problems, are related to the 1996 injury and/or gradual trauma as a result of his work as a welder. I disagree with Employer's assertion that Dr. Phelps related all of the Claimant's conditions, except the left shoulder, to the 1996 injury. Rather, Dr. Phelps, in sequential order, diagnosed Claimant's neck and shoulder conditions, opined that, with the exception of the degenerative component of the left shoulder, these conditions relate to the 1996 injury and/or the cumulative effects of his welding work, and then concluded that the knee condition was also related to his employment, but did not reference the 1996 injury. This opinion relating a causal connection between the 1996 injury and Claimant's present neck and shoulder conditions, together with Claimant's credible testimony describing the injury, are sufficient to invoke the presumption of causation.

To rebut the presumption, Employer must produce substantial evidence that severs the presumed connection between Claimant's present condition and the 1996 injury. *See Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1981). When aggravation of or contribution to a pre-existing condition is alleged, the presumption also applies, and in order to rebut it, the employer must establish that the claimant's condition was not caused or aggravated by his employment. *Rajotte v. General Dynamics Corp.*, 18 BRBS 85, 86 (1986). Where the employer presents "specific and comprehensive" evidence sufficient to sever the connection between the harm and the employment, the presumption no longer controls and the issue of causation must be resolved on the record as a whole. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1081-85, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). I find that the Employer has produced substantial evidence to sever the relationship between Claimant's current condition and the 1996 injury. Employer's expert, Dr. Boucher, unequivocally opined that the 1996 injury had completely resolved and was not related to Claimant's present disabilities. While he did state that many of Claimant's problems stem from the cumulative effects of his work as a welder at BIW, he concluded that none of the current conditions relate to the 1996 injury. This opinion is clearly sufficient to rebut the presumption of causal relationship to the 1996 injury, requiring an analysis of the record as a whole to resolve the causation issue.

In assessing the opposing medical opinions, I note that both Drs. Phelps and Boucher are board-certified physicians, and each conducted an evaluation of the Claimant and a seemingly thorough medical records review. However, having reviewed the record in its entirety, I conclude that the opinion of Dr. Phelps is more consistent with the objective medical evidence, showing that the 1996 injury contributes in part to Claimant's present dysfunctional condition. It is undisputed that at the time of the 1996 injury, the Claimant had a pre-existing left shoulder condition originally stemming from a dislocation and two surgeries when he was a teenager, but nothing in the medical record indicates that he was having any notable left shoulder problems until five days after the 1996 injury. On that day, January 11, 1996, Claimant reported the wire feeder incident to BIW's Health Department and complained of worsening pain in his upper back and left hand numbness of particular

concern. Claimant's orthopedic records also show that on August 19, 1996, he complained of left shoulder pain of approximately four months duration, which I find is close enough in time and most likely corresponds to the January 8, 1996 injury, particularly given the left hand numbness complaints right after the injury and the absence of any left shoulder/arm complaints before the injury. The August 19, 1996 complaint to his orthopedist prompted a course of treatment for Claimant's left shoulder which included the consideration of surgery as early as October, 1996, left shoulder surgery in December, 1998, and a permanent left shoulder impairment and work restrictions. Records from Dr. Vigna, the neurologist, also provide support for a link between the 1996 injury and Claimant's left shoulder/arm problems. Dr. Vigna examined the Claimant on November 10, 1998 for persistent left neck, shoulder, and left arm complaints of about a year and half to two years duration related to a wire feeder incident. He diagnosed the Claimant with left C6/C7 radiculopathy with possible connection to the left shoulder pain. Similarly, Dr. Esponnette opined that the left shoulder/arm problems may be related to the neck condition.

I find that this medical evidence is more consistent with the opinion of Dr. Phelps that the 1996 injury contributes to Claimant's current shoulder and neck conditions than that of Dr. Boucher, who considered the 1996 injury completely resolved. Dr. Boucher's conclusion that the left shoulder condition is not related to the 1996 injury fails to consider the timing of the left shoulder complaints and its relationship to the neck conditions, including the left radiculopathy, which was noted by Drs. Vigna and Esponnette. I have also considered the M-1 Forms completed by many of Claimant's treating physicians indicating that his injuries were work-related, but I have not relied upon them because none of these M-1 Forms references the 1996 injury.

I am not persuaded by Employer's argument that Dr. Phelps' findings should be rejected because his medical license is on indefinite probation in Maine and has been voluntarily surrendered in New York. There is no indication that Dr. Phelps has violated the terms of his probation in Maine, and in fact, Claimant offered uncontradicted evidence of a deposition transcript in another case in which Dr. Phelps testified on December 4, 2002 that he complies with those terms. CX 16 at p. 76-77. Dr. Phelps is a board-certified orthopedic surgeon, who provided a detailed and well-documented opinion, and his probationary status alone does not compel my rejection of his opinion in its entirety on competency grounds. Accordingly, I find that the 1996 workplace injury is causally related to the Claimant's present left shoulder and neck impairments.¹

The record contains work restrictions from many physicians, including those retained by the Employer, that substantially limit Claimant's ability to perform overhead work with his left arm due to left shoulder/left radiculopathy dysfunction (CX 25 at p. 206; CX 21 at p. 145; CX 15 at p. 69; EX 36 at p. 118-119). Further, Claimant credibly testified that he cannot perform welding work because of his shoulder pain/problems. Based on this testimony and the work restrictions in the record, I find that Claimant cannot return to his usual work as a welder due in part to the effects of the 1996 injury. Given this finding, I conclude that it is unnecessary to resolve the parties' dispute about whether this case involves solely the 1996 injury or also includes Claimant's cumulative trauma injuries, as where the Claimant cannot return to his usual work due to a work-related injury, the burden shifts to the Employer to demonstrate suitable alternate employment. *See Palombo v.*

¹ In limiting my causation analysis to the 1996 injury and the left shoulder/arm and neck impairments, I am not expressing an opinion about the relationship between the Claimant's other disabilities and his employment at BIW for purposes of entitlement to medical benefits, particularly where both parties' medical experts agree that many of Claimant's conditions were caused by gradual injury sustained through his work as a welder at BIW.

Director, OWCP, 937 F.2d 70, 73 (2d Cir. 1991). A discussion of this issue follows.

Extent of Disability

Positions of the Parties

According to Claimant, as he cannot return to his usual work and Employer has no suitable work available for him, Employer has the burden to show that suitable alternative jobs are realistically available to him and that he is not participating in a suitable vocational rehabilitation program. Cl. Br. at p. 9-10. Claimant cites *Abbott v. Louisiana Ins. Guaranty Ass'n*, 40 F.2d 122, 29 BRBS 22 (CRT) (5th Cir. 1994), for the proposition that he is entitled to total disability compensation because he is involved in a vocational rehabilitation program even though the Employer has offered labor market survey evidence of minimum wage type jobs. *Id.* Claimant represents that *Abbott* was recently upheld in *Castro v. General Construction Co.*, BRB No. 02-0783 (5/13/03), where the Board affirmed the award of total benefits during an approved rehabilitation program for a scheduled injury. *Id.* Claimant avers that the Board in *Castro* set forth appropriate factors, none of which are dispositive, for determining whether a vocational rehabilitation program renders labor market survey evidence irrelevant. These factors are:

1. Whether the employer agreed to the rehabilitation program and the continuing payment of benefits;
2. Whether the claimant's enrollment in the plan precluded employment;
3. Whether the completion of the program results in an increased wage earning capacity for the claimant, thereby maximizing the claimant's skills and minimizing the employer's liability; and,
4. Whether the claimant showed full diligence in completing the program.

Id. at p. 9-10. Regarding the first factor, Claimant contends that while the Employer did not approve the program, it did not oppose it either, continuing to pay benefits to Claimant, and in *Castro*, the Board found no employer approval, which was not dispositive. *Id.* at p. 10. Regarding the second factor, Claimant represents that his program and study time preclude employment. *Id.* Third, Claimant submits that the program would enable him to earn his pre-injury wages, and without the program, he would only earn \$6.00-7.00 per hour. *Id.* Fourth, Claimant argues that he has shown full diligence, in that he has been out of school for almost 20 years, has received his GED and successfully completed a number of courses, and Dr. Ruffing testified that he was well-motivated. *Id.*

In the alternative, Claimant argues that if I consider the labor market survey evidence, it is deficient because it is essentially job advertisements from the newspaper and relies on the restrictions of Dr. Boucher, not the treating physicians or the examining physician, Dr. Phelps. Claimant notes that the labor market survey evidence is not adequate because it fails to account for his depression due to his pain, loss of career, and BIW's surveillance activities. *Id.* Claimant summarizes that the labor market survey jobs are not realistically available to him and are nevertheless irrelevant because of his enrollment in a vocational rehabilitation program. *Id.*

Employer admits that when it is uncontroverted that the Claimant cannot return to his usual employment duties, it has the burden to show suitable alternate employment, which may not be reasonably available where the employee is participating in a rehabilitation program sponsored by the Department of Labor. Emp. Br. at p. 11. While conceding this point, Employer argues that continuing total disability compensation should be denied in this case for a number of reasons. *Id.* at p. 11-12. First, Employer contends that there is no evidence that the Department of Labor approved, sponsored, or was in any way involved in the Claimant's rehabilitation efforts,

notwithstanding Dr. Ruffing's testimony. *Id.* Employer argues that the record contains no orders, reports, evaluations, or other documentary evidence that establish that the Department of Labor has been actively involved in the program, citing *Brown v. Nat'l Steel and Shipbuilding Co.*, 34 BRBS 195 (2001) for this alleged requirement. *Id.* at p. 12. Alternatively, the record contains no evidence of continued involvement because, according to Employer, the Claimant unilaterally and significantly changed aspects of the program by dropping the math prerequisite, which may preclude his beginning the program in the fall, and Dr. Ruffing was unaware of this change. *Id.*

In addition, Employer cites the four factors previously identified by Claimant for evaluating whether total disability compensation is appropriate where the employee is participating in a vocational rehabilitation program. *Id.* at p. 12-13. First, Employer submits that it was not aware of the rehabilitation program at all, and that Claimant has a full-time, light to medium work capacity which, through its labor market survey evidence, establishes his weekly earning capacity of between \$280.00 and \$360.00. *Id.* at p. 13. Further, it is unclear whether Claimant can begin the program in the fall, he and Dr. Ruffing disagree on the length of the program, and Claimant was not working full-time hours in this program and was clearly able to work. *Id.* Employer points to *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000) for the proposition that Claimant has the burden to show that suitable alternative jobs are not realistically available to him because of his involvement in the program, and the record does not establish that the program precludes his working. *Id.* at p. 13-14. Claimant has failed to show that he diligently sought but was unable to obtain suitable alternate employment, citing a recent decision rendered by Administrative Law Judge Daniel F. Sutton in *Collamore v. Bath Iron Works*, 2001-LHC-02281, 2002-LHC-00891, 2002-LHC-00892 (May 22, 2003) that a claimant may not just rely on his participation in a program to show that suitable alternate employment is unavailable. *Id.* at p. 14.

Finally, Employer submits that the only substantive and credible evidence of Claimant's current earning capacity is the labor market surveys, which show, in conjunction with the functional capacity evaluation in Dr. Boucher's report, that he can realistically earn between \$280.00 and \$360.00 per week. *Id.* Further, Employer submits that the recycling activities do not constitute suitable alternate employment because they produced only minimal earnings and were more like a hobby. *Id.*

Discussion and Conclusion

In a claim for disability compensation that is not based on the schedule of losses in section 8(c) of the Act, a claimant has the initial burden of establishing that he cannot return to his usual employment. *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984). The parties are in agreement that the Claimant cannot return to his usual employment as a welder, and I previously found that this was due in part to the effects of the 1996 injury. Once Claimant has established that he is unable to return to his former employment because of a work-related injury, the burden shifts to the Employer to demonstrate the availability of suitable alternative employment, that is, realistic jobs which the Claimant is capable of performing and which he could secure if he diligently tried. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991) (*Palombo*). If Employer does not carry this burden, Claimant is entitled to a finding of total disability. *American Stevedores v. Salzano*, 538 F.2d 933, 935-36 (2d Cir. 1976).

Employer's vocational evidence clearly establishes that there were full-time suitable alternative jobs in existence at the time of the March 14, 2002 labor market survey (EX 39) and that full-time suitable jobs continued to exist at the time of the second labor market survey in February, 2003 (EX 40). While Claimant is correct that job advertisements cannot constitute suitable employment, the labor market surveys here do not consist solely of job advertisements, but rather contain specific, currently available jobs with all the essential terms in Sections C of each survey, which are sufficient

to demonstrate suitable employment. See *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 334 (1989). Further, I reject Claimant's argument that the survey evidence is inadequate because it did not rely on the work restrictions of the treating physicians and Dr. Phelps and did not account for his depression. The survey author accounted for the restrictions assigned by Dr. Esponnette in the March, 2002 survey and those of Dr. Boucher in the February, 2003 survey, and I find that those restrictions are similar in all material respects to those of the treating physicians and Dr. Phelps. Moreover, I have reviewed the physical requirements of the jobs, which are primarily sales, security, and desk positions, and they comport with Claimant's work restrictions to avoid heavy lifting, overhead work, reaching with the left arm, repetitive climbing of stairs/ladders, and kneeling. Regarding the depression, neither Dr. Phelps nor any of the treating physicians provided the opinion that Claimant is incapable of working because of his depression, and the labor market survey evidence is not, therefore, inadequate on that basis.

Claimant next argues that despite the showing of suitable alternative employment, he is entitled to total disability benefits because of his participation in a rehabilitation program sponsored by the Department of Labor. Employer acknowledges that Claimant can be awarded total benefits if he can show that suitable jobs are not realistically available to him due to his enrollment in such a program, pursuant to *Abbott v. Louisiana Ins. Guar. Ass'n.*, 27 BRBS 192 (1993) [*Abbott*], *aff'd sub. nom., Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122 (5th Cir. 1994). However, Employer argues that *Abbott* is not applicable because Claimant has failed to produce documentary evidence of the Department of Labor sponsorship, despite Dr. Ruffing testimony that the program was approved by the Department, citing *Brown v. Nat'l Steel and Shipbuilding Co.*, 34 BRBS 195 (2001). *Brown* involved the extension of *Abbott* to state-sponsored rehabilitation programs, and contrary to Employer's assertion, there was no requirement in *Brown* that a claimant demonstrate program sponsorship by documentary evidence. Moreover, I found Dr. Ruffing to be a highly credible witness, whose testimony that the Department of Labor approved the program and is paying for the tuition has not been contradicted by any record evidence, and Dr. Ruffing's reports reference an OWCP Certification Number I-82, which clearly supports his testimony.

In addition, I reject Employer's argument that *Abbott* is not applicable because Claimant unilaterally and significantly changed the terms of the program by dropping the math prerequisite without Dr. Ruffing's knowledge. I find that this was a minor delay in Claimant's progress, not a significant change, and Dr. Ruffing testified that he was aware of the change and that Claimant would be making up the math course over the summer. Dr. Ruffing's most recent report, dated June 20, 2003, shows that Claimant is indeed working towards completing the math course and will be enrolled in the following courses (Electricity I, Electrical Controls, and Trigonometry/Geometry) in the fall semester. Finally, I note that in *Castro*, the Board stated that "[t]he administrative law judge's role does not involve reviewing the implementation of the rehabilitation plan or a claimant's entitlement to rehabilitation services, but rather he assesses the effect of the plan on the claimant's employability during its implementation." *Castro, supra*, slip op. at p. 8, n.6.

To that end, the parties agree that in determining whether Claimant is entitled to total benefits because of his enrollment in a qualified rehabilitation program, I must evaluate the following factors:

- Whether the employer agreed to the rehabilitation program and the continuing payment of benefits;
- Whether the completion of the program results in an increased wage earning capacity for the claimant, thereby maximizing the claimant's skills and minimizing the employer's liability;
- Whether the claimant's enrollment in the plan precluded employment; and

- Whether the claimant showed full diligence in completing the program.

See Gregory v. Norfolk Shipbuilding & Dry Dock Co., 32 BRBS 264, 266-67 (1998).

Regarding the first factor, Claimant agrees that Employer did not approve the program, and I find that by modifying its voluntary compensation payments from total to partial disability around the time of the beginning of the retraining program in April, 2002 (EX 18), the Employer has demonstrated its objection to the program. As Claimant correctly points out, this factor is not necessarily dispositive, as in *Castro*, the Board affirmed the award of total benefits despite the employer's opposition to the program. *Castro, supra*, slip. op. at p. 10. Consequently, I will also consider the other three factors in the analysis. Regarding the second factor, earning potential, Dr. Ruffing credibly testified that after completing the associate's degree program, Claimant's earning potential as an electrical-mechanical technician would be \$35,000 annually. Employer has offered no contradictory evidence of post-program earning potential, arguing instead that the labor market survey evidence best demonstrates Claimant's earning potential of between \$280.00 and \$360.00 a week, which corresponds to \$14,560 to \$18,720 annually, and I find for the most part is consistent with the salary referenced in the labor market surveys of \$6.00 to \$7.00 per hour. Based on this evidence, I find that completing the program would result in a significantly higher wage earning capacity, and I also note Dr. Ruffing's testimony that Claimant has a nearly 100 percent chance of employability after completing the program given the high demand for these workers. Thus, Claimant's successful completion of the program will very likely result in a reduced liability for Employer as he would be earning wages that would more approximate his pre-injury wages as a welder. *See Brown*, 34 BRBS at 198.

Regarding the third factor, Claimant credibly testified that after leaving work, he studied for and received his GED in June, 2002 and entered the associate's degree program in September, 2002, while continuing to study math and writing in the interim, spending 40 hours per week in these endeavors. At the time of the hearing, he testified to spending 16 hours per week in classes and tutoring and roughly 20 - 30 hours per week studying. He admitted that he had to drop his math course because he was having difficulty with it, but intended to make up the course over the summer. Dr. Ruffing's most recent report (CX 29) confirms that he is working towards that goal and that he will be enrolled in Electricity I, Electrical Controls, and Trigonometry/Geometry in the fall semester. Based on this schedule, particularly the rigorous course work for the upcoming semester, and attendant time commitments, I find that Claimant's enrollment in the program precludes employment as he is involved substantially full-time with his classes, tutoring, and study requirements. To the extent that he may not have been engaged for precisely 40 hours per week during the semester in which he dropped the math course, Claimant's schedule required him to attend classes or tutoring Monday through Thursday and to spend a considerable amount of time studying. It would be unreasonable to require him to work a part-time job (15-20 hours per week) in addition to this schedule, again particularly given the demands of the upcoming fall semester. In this regard, I am also persuaded by Dr. Ruffing's testimony that it would be unwise to require Claimant to work a part-time job in addition to going to school, given that he is returning to school after 20 years and needs a good deal of tutoring to complete the program. In *Kee v. Newport News Shipbuilding and Dry Dock Co.*, 33 BRBS 221, 223-24 (2000), the Board affirmed an ALJ's finding that claimant failed to show that the program precluded employment where claimant did not testify and relied solely on an exhibit that did not provide details of the program. This case is clearly unlike *Kee*; Claimant credibly testified about his class and study schedule, and Dr. Ruffing's testimony and reports support that testimony.

Regarding the fourth factor, I find that Claimant has shown full diligence in completing the

program. For this finding, I rely heavily on Dr. Ruffing's testimony that Claimant is an exemplary student, who uses all of the resources available to him, including the tutor program and the Adult Education Center. With regard to Claimant's dropping the math course, Dr. Ruffing's June 23, 2003 report shows that Claimant is in the process of completing the course and will enroll in major courses in the fall semester. Regarding Claimant's testimony that he may need three years to complete the two-year program, Dr. Ruffing testified that he would monitor the length of the program as required by OWCP and would work with him, stating that he believed Claimant would progress faster as he went through the program. Indeed, the June 23, 2003 report showing Claimant's schedule for the upcoming semester demonstrates his progress. Finally, Dr. Ruffing, as a vocational expert with 35 years of experience, expressed confidence in the Claimant's ability to succeed in the program. I find this particularly convincing evidence of his full compliance with the program requirements. Based on my evaluation of the four relevant factors, which aside from Employer's objection to the program, weigh heavily in favor of Claimant, I conclude that Claimant has met his burden of showing that Employer's offer of suitable alternate employment is not realistically available to him due to his enrollment in a qualified rehabilitation program. Finally, I note that requiring Claimant, a 37-year old man with many employment years ahead of him, to work minimum wage type jobs for the duration of those years when there is a strong possibility that he can earn his pre-injury salary after completing the retraining program would only result in increasing Employer's liability over the long term and run counter to one of the fundamental policies of the Act to rehabilitate injured workers. *See Abbott*, 27 BRBS at 203. Accordingly, I conclude that Claimant is entitled to an award of continuing total disability compensation due to his enrollment in a Department of Labor-sponsored rehabilitation program.

Nature of Disability

Positions of the Parties

Claimant argues that the evidence establishes that his conditions are permanent and would accept a permanency date of June 12, 2001 based on the opinion of Dr. Esponnette, who examined him on BIW's behalf and opined that he had reached maximum medical improvement on that date. Cl. Br. at p. 8-9. In addition, Claimant contends that this date would be consistent with the opinion of Dr. Phelps, who opined that he reached maximum medical improvement for his right shoulder in December, 1999, left shoulder in September, 2001 and neck in 1997. *Id.* Finally, Dr. Katz provided the opinion that his left shoulder was permanent as of April 5, 1999 and both shoulders were chronic as of April 24, 2000. *Id.* In its brief, Employer makes no specific argument regarding permanency, stating merely that if I find sufficient evidence of causation, the Claimant would be entitled to temporary partial benefits at most. Emp. Br. at p. 14.

Discussion and Conclusion

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement. The determination of when maximum medical improvement is reached so that claimant's disability may be characterized as permanent is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). Finally, a finding of permanency does not necessarily foreclose the possibility that a claimant's condition may change, only that the normal healing period has expired and the condition is lasting or indefinite in nature. *See Watson, supra*, at p. 654-55. I agree with Claimant that the bulk of the medical evidence establishes that he reached maximum medical improvement as of June 12, 2001. I rely primarily on

the opinion of Dr. Esponnette, a board-certified physician, who opined that the Claimant's upper extremities were permanent in nature as of the date of his examination, June 12, 2001. Further, as Claimant points out, this finding is for the most part consistent with the opinions of Dr. Phelps and Dr. Katz, one of the treating orthopedists.

Interest on Unpaid Compensation

Although not specifically authorized in the Act, the Benefits Review Board and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). Interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). The Board has also concluded that inflationary trends in the economy render use of a fixed interest rate inappropriate to further the purpose of making claimant whole, and it has held that interest should be assessed according to the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982) which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. §1961 (1982) by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Attorney's Fees

Having successfully established his right to compensation and medical benefits, Claimant is entitled to an award of attorneys' fees under section 28(a) of the Act. *Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976). In my order, I will allow the Claimant's attorney 30 days from the date this Decision and Order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. §702.132, and the Employer will be granted 15 days from the filing of the fee petition to file any objection.

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

1. The Employer, Electric Boat Corporation, shall pay to the Claimant, Jerry E. Gorman, permanent total disability compensation pursuant to 33 U.S.C. §908(a) of the Act commencing April 15, 2002 to the present and continuing, based on the average weekly wage of \$546.18;
2. The Employer shall be allowed a credit pursuant to 33 U.S.C. §914(j) for prior payments of temporary disability compensation;
3. The Employer shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injuries may require, pursuant to 33 U.S.C. §907;
4. The Employer shall pay to the Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each

payment was originally due until paid;

5. The Claimant's attorney shall file, within thirty (30) days of the filing of this Decision and Order in the office of the District Director, a fully supported and fully itemized fee petition, sending a copy thereof to counsel for the Employer who shall then have fifteen (15) days to file any objection; and

6. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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WILLIAM J. COWAN
Administrative Law Judge

Boston, Massachusetts